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Convention on jurisdictional immunities of States and their property

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Report of the Secretary-General**

Contents

		Page
I.	Introduction	2
II.	Replies received from States	2
	Antigua and Barbuda	2
	China	2

* A/56/150.
** The present report contains the replies received as at 15 August 2001.

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I. Introduction

1. By paragraph 2 of its resolution 55/150 of 12 December 2000, entitled "Convention on jurisdictional immunities of States and their property", the General Assembly urged States, if they had not yet done so, to submit their comments to the Secretary-General in accordance with Assembly resolution 49/61 of 9 December 1994, and also invited States to submit in writing to the Secretary-General, by 1 August 2001, their comments on the reports of the open-ended working group of the Sixth Committee established under resolutions 53/98 and 54/101.

2. By paragraph 2 of its resolution 49/61, the Assembly invited States to submit to the Secretary-General their comments on the conclusions of the chairman of the informal consultations held pursuant to Assembly decision 48/413 of 9 December 1993, and on the reports of the Working Group established under Assembly resolution 46/55 of 9 December 1991 and reconvened pursuant to its decision 47/414 of 25 November 1992.

3. By a note dated 28 December 2000, the Secretary-General invited States to submit comments in accordance with paragraph 2 of Assembly resolution 55/150.

4. The present report contains the replies received as at 15 August 2001. Any replies which may subsequently be received will be reproduced as an addendum to the present report.

5. The present report supplements the replies received from States pursuant to paragraph 2 of Assembly resolution 49/61 (see A/52/294). The present report also supplements replies received from States pursuant to paragraph 2 of Assembly resolutions 52/151 of 15 December 1997 and 54/101 of 9 December 1999 (see A/53/274 and Add.1, A/54/266 and A/55/298).

II. Replies received from States

Antigua and Barbuda

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[26 April 2001]

The Permanent Mission of Antigua and Barbuda, with reference to Assembly resolution 55/150, is in full accordance with what is called for and is, in particular, in strong support of an ad hoc committee on jurisdictional immunities of States and their property.

China

[Original: Chinese]
[19 July 2001]

General comments

1. According to traditional international law, States and their property enjoy absolute jurisdictional immunities but, in recent years, the practice of States on this subject differs greatly. Some States apply the principle of absolute immunity, others the principle of restrictive immunity; even for States applying the principle of restrictive immunity, rules of internal laws vary. Therefore, the Government of China considers that for the topic of jurisdictional immunities of States and their property, it is imperative that a uniform rule be adopted.

2. The Government of China also believes that an international rule adopted for such an important subject should be legally binding and operational, so that it could be applied directly by national courts in dealing with relevant cases. Thus, convening a diplomatic conference to adopt a convention is the best way truly to realize the goal of harmonizing the law and practice of States in the area of State immunity.

3. The draft articles adopted by the International Law Commission on this topic after years of deliberation provide a solid basis for States to adopt a uniform norm of international law on this topic. The Sixth Committee achieved substantial progress in its work during the fifty-fourth and fifty-fifth sessions of the General Assembly, and States were able to make progress on some important questions, thus we are hopeful that a convention could be adopted. Efforts are still needed to resolve the remaining substantive questions, but discussion in the Sixth Committee during the past two sessions of the Assembly indicates that it is possible for States to achieve consensus on those questions.

Specific comments

4. The following are preliminary comments and observations of the Government of China on some of the important questions regarding this topic. The

Government of China reserves the right to make additional comments on these questions or to make comments and observations on other questions relating to this topic in the future.

Article 2, paragraph 2, concerning tests for determining a commercial transaction

5. Article 2 establishes the principle that if a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction. The Government of China endorses this principle but, in determining whether a contract or transaction is a commercial transaction under the Convention, applying only the "nature" test of article 2, paragraph 1 (c), is far from adequate — the purpose of the State for engaging in the transaction must also be considered. Adopting a rule on jurisdictional immunities of States and their property would no doubt provide protection for natural or juridical persons involved in the transaction, but this should not jeopardize the public purpose of the State for engaging in the transaction. A balance must be struck between the "nature" test and the "purpose" test to protect the property of States used for public purposes under exceptional circumstances. It has been argued that the "nature" test is ambiguous, since it seems possible to identify certain public purposes in every transaction that is carried out by a State. In this respect, the Government of China believes that applying the "nature" test in no way provides additional protection for commercial transactions carried out by a State; its purpose is not to disregard the special interest of a State under exceptional circumstances, such as the procurement of food supplies to relieve a famine situation, purchase goods to revitalize an affected area, or supply medicaments to combat a spreading epidemic. The "purpose" test may not have clear and concise determining criteria as the "nature" test, but it is by no means impossible to apply. If, in practice, the purpose of a State engaging in a given commercial transaction is indeed relevant to the determination of the non-commercial nature of the contract or transaction, the defendant State should be given an opportunity to prove its case. The Government of China agrees in principle with the views of the International Law Commission as reflected in its commentary on the draft articles adopted on second reading. The Commission views the "purpose" test as a supplementary standard employed to minimize unnecessary disputes which could arise from differences in State practice if only the "nature" test is applied. Applying the "purpose" test would not hamper the flexibility of national courts in making judicial interpretations when dealing with relevant cases, but would provide guidance to Governments, courts and enforcement officials, and ensure that relevant factors concerning the contract or transaction are taken into consideration.

6. In sum, the Government of China considers that article 2, paragraph 2, of the 1991 draft articles is a reasonable text, reflecting an appropriate balance between the "nature" test and the "purpose" test and takes into full consideration the practice of States.

Article 10, concerning commercial transactions

7. It is the view of the Government of China that, in principle, a State enterprise or other entity established by a State does not enjoy State immunity if that State enterprise or other entity has an independent legal personality and is capable of suing or being sued, acquiring, owning or possessing and disposing of property, including property which the State has authorized it to operate or manage. It is the understanding of the Government of China that the basis for determining whether a State enterprise or other entity has an independent legal personality should be the provisions of the internal law of the State concerned. Therefore, article 10, paragraph 3, should be reformulated to read "... a State enterprise or other entity established by the State which has an independent legal personality *in accordance with the internal law of that State* and is capable of: ...". According to the relevant laws of China, Chinese State enterprises and other entities established by the State have independent legal personality.

8. The Government of China also believes that a clear distinction should be drawn between States and State enterprises or other entities established by States. A State enterprise or other entity established by a State should assume civil liability for itself, and a State should not be jointly and severally liable for the commercial activities and the liabilities or obligations of any of its State enterprises or other entities, unless the State enterprise concerned has an agency

relationship with the State in the transaction or the State enterprise is authorized to perform acts in the exercise of the sovereign authority of the State. Thus, it is important for article 10, paragraph 3, of the draft articles to stress that the immunity from jurisdiction enjoyed by a State should not be affected in a proceeding brought against its State enterprises or other entities. This could prevent abuse of the judicial process by the plaintiff.

9. Therefore, the Government of China considers that article 10, paragraph 3, of the 1991 draft articles is acceptable with the following reformulation: "... a State enterprise or other entity established by the State which has an independent legal personality *in accordance with the internal law of that State* and is capable of: ...".

Article 18, concerning State immunity from measures of constraint

10. The Government of China considers that, in theory, immunity from measures of constraint is separate from jurisdictional immunity, and the consent of a State to the exercise of jurisdiction of the court of another State should not imply its consent to the taking of measures of constraint, for which separate consent should be necessary. Moreover, compared to immunity from jurisdiction, immunity from measures of constraint is more akin to absolute immunity. Relevant international practice also supports such a view. Therefore, the Government of China considers that, in principle, the provision of article 18 of the 1991 draft articles is acceptable.

11. However, some improvements are still needed to article 18. The most serious concern is that article 18 fails to differentiate between pre-judgement measures of constraint and post-judgement measures of constraint. The Government of China believes that, in general, the question of immunity from measures of execution arises only after a national court has rendered a judgement in favour of the plaintiff. In principle, measures of constraint should not be implemented against State property before judgement. This would prevent national courts from abusing measures of constraint, causing harm to the property of a foreign State. This is particularly true in cases where there are serious disputes on the question of jurisdictional immunity. If national courts are permitted to implement measures of constraint against the property of a defendant State before judgement is rendered, the State property of the defendant State, in particular property involved in a public purpose transaction, could suffer unnecessary harm. Thus, the Government of China supports the separate treatment of pre-judgement measures of constraint and post-judgement measures of constraint, either in two separate paragraphs within article 18 or in two completely separate articles. It should also be stressed that the consent of the defendant State is required for implementing pre-judgement measures of constraint.

12. For post-judgement measures of constraint, the Government of China considers that, in principle, consent of the defendant State is also essential for the execution of such measures, especially in cases in which the defendant State is still contesting the jurisdictional immunity question. When a national court implements measures of constraint against the property of a defendant State without its consent, not only would such an action violate the famous legal axiom of *par in parem imperium non habet*, it could also strain relations between the two States. Therefore, there should be room for the Governments of the two States to resolve the question through diplomatic channels and the arbitrary enforcement of measures of constraint avoided.

13. The Government of China also believes that whenever a court takes measures of constraint against the property of a defendant State, the following conditions must be fully satisfied: (a) the property is in the territory of the State of the forum; (b) the property is specifically in use or intended for use by the State for other than government non-commercial purposes; (c) the property has a connection with the claim which is the object of the proceeding, or with the agency or instrumentality against which the proceeding was directed. The last condition is of special significance, as it is an important criterion for differentiating the property of a State from that of a State enterprise or other entity, and for differentiating the property of the various State enterprises and other entities. The Government of China believes that obligations of a State enterprise or other entity having an independent legal personality should be settled with the property of that State enterprise or other entity and not with the property of the State to which it belongs or with the property of other enterprises or entities. Similarly, obligations of a State should only be settled with property directly possessed by the central government of that State and not with the property of its State

enterprises or other entities. Absence of a strict limitation on the property subject to measures of constraint invites the possible misuse of such measures by a court with respect to the property of the defendant State or the property of other State enterprises or entities not related to the proceeding, and could cause uncertainty and inconsistency in the implementation of measures of constraint by national courts. Therefore, the Government of China endorses the text of article 18, paragraph 1 (c), of the 1991 draft articles.